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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33898

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AS SUBSCRIBING POLICY NO.: B0711, Plaintiffs Below,

v.

PINNOAK RESOURCES, LLC AND PINNACLE MINING CO., LLC, Defendants Below.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, AS SUBSCRIBING POLICY NO.: B0711, Appellants

APPELLANTS' BRIEF

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KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

Plaintiffs Certain Underwriters at Lloyd's, London (hereinafter "Heritage and Talbot") hereby file this Appellants' Brief and seek the reversal of the following two orders:

- The entry of an April 11, 2007 Judgment granting PinnOak Resources, LLC and Pinnacle Mining Company, LLC's (hereinafter "PinnOak") Rule 12(b)(6) Motion to Dismiss. And,
- The entry of a June 21, 2007 Judgment denying Heritage and Talbot's Rule 59(e) Motion to Alter or Amend the Court's April 11, 2007 Judgment.

During the proceedings below, the Circuit Court of Wyoming County converted Defendants' Rule 12(b)(6) Motion to Dismiss into a Rule 56(e) Motion for Summary Judgment, and then granted Defendants summary judgment. The Circuit Court found, without any discovery, that

- The word "payback" in Insurance Policy no. B0711, which provided PinnOak coverage from 2004-2009, meant the "payback" of monies from a May 2006 settlement. And,
- Heritage and Talbot released any right to a "payback" premium under the terms of the settlement agreement that accompanied the May 2006 settlement.

Heritage and Talbot dispute the above two findings and therefore appealed the Circuit Court's orders. On April 2, 2008, this Honorable Court granted Heritage and Talbot's

Petition for Appeal. Heritage and Talbot now ask this Court to reverse the Circuit Court's rulings because:

- The Circuit Court's determination concerning the meaning of the word "payback" contradicts the only sworn testimony that explains the word's meaning. Specifically, Heritage's underwriter, Leslie Rock, and Group Head of Claims, Simon White, explained in sworn affidavits that the word "payback" referred to the payment of a $5,000,000 deferred premium—not a repayment of settlement monies. And, PinnOak failed to challenge the substance of White's and Rock's testimony with any evidence.
- The May 2006 Settlement Agreement, by definition, only applied to claims relating to the August 31, 2003 "Loss." The Settlement Agreement defined "Loss" **only** as PinnOak's "claim for business interruption and other losses... as well as PinnOak's claims of bad faith...." The "Loss" definition referred to two specific policy numbers––AN0300337 and AN0300338 (in effect for policy year 2003-2004)—but conspicuously did **not** refer to Policy No. B0711, which provided coverage from 2004 to 2009. In summary, the Settlement Agreement only resolved PinnOak's coverage action filed in Wyoming Co. But it did not provide a release for all of the parties' business dealings.

For the above reasons, Heritage and Talbot respectfully request that this Honorable Court reverse the Circuit Court's two rulings and therefore allow Plaintiffs' claims, and discovery, to proceed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter is before this Court as the result of Heritage and Talbot's First Amended Complaint that alleged breach of contract based on PinnOak's failure to pay the premium for a five-year policy effective from 2004-2009 (Policy B0711). Section A of this factual history, *infra*, summarizes PinnOak's previous insurance coverage from 2003-2004 (i.e. Policy Nos. AN0300335, AN0300336, AN0300337, and AN0300338), and the related loss attributable to a methane ignition on August 31, 2003. Section B, *infra*, then summarizes the premium owed for PinnOak's subsequent insurance for 2004-2009 (i.e. Policy B0711), which is the subject of this action.

A. PinnOak's 2003-2004 Property Insurance Policies and Their Claim for a Methane Ignition on August 31, 2003 Under Policy Nos. AN03000337 and AN03000338

The Defendants operated the Pinnacle Mine in Wyoming County, as well as the Oak Grove Mine located in Alabama.[1] From June 30, 2003 to June 30, 2004, five insurance companies,[2] and Certain Underwriters at Lloyd's, London, combined to provide PinnOak with property insurance totaling $75,000,000.[3] The Lloyd's policy numbers were AN0300335, AN0300336, AN0300337, and AN0300338, which correspond to four insurance layers.[4]

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[1] The Defendants have since sold their mines to Cleveland-Cliffs, Inc.

[2] Allied Word Assurance Company, XL Insurance (Bermuda) Limited, Commonwealth Insurance Company, Zurich Specialties London Limited, and Axis Specialty Europe Limited.

[3] Essentially, instead of one insurance company taking on the responsibility of insuring PinnOak—a large mining risk—the five different insurance companies (and Lloyd's) combined to provide PinnOak's coverage. This spread the risk among these insurers so a large loss would not inordinately impact any one insurer's balance sheet.

[4] Here, PinnOak's 2003-2004 insurance totaled $75,000,000. The five companies and Lloyd's broke down the $75,000,000 amount into four main insurance "layers."

On August 31, 2003, PinnOak sustained the first of a series of methane ignitions inside the Pinnacle Mine.[5] PinnOak subsequently filed an insurance claim to recover for property damage and business interruption losses with all of the above property insurers. The insurers then commenced an investigation but encountered difficulties conducting the cause of loss investigation as the ignitions hampered mine access. And, before the mine was reopened, PinnOak filed suit against all their property insurers in the Circuit Court of Wyoming County under Civ. No. 04-C-30 on February 6, 2004.[6] PinnOak claimed that its insurers, including Certain Underwriters at Lloyd's, London subscribing to Policy Numbers AN0300335, AN0300336, AN0300337, and AN0300338, breached their insurance policies and committed bad faith claims-handling concerning PinnOak's August 31, 2003 loss.

PinnOak settled with some of its insurers at various points in time in 2004 and 2005. In 2006, the remaining insurers were those Lloyd's Syndicates subscribing to the two upper "layers" (i.e., Policy No. AN000337 that provided insurance of $30,000,000 excess the first $20,000,000 insured, and Policy No. AN000338 that provided insurance of $25,000,000 excess the first $50,000,000 insured). Finally, on May 30, 2006, PinnOak executed a "Global Settlement Agreement and Release" (hereinafter "Settlement Agreement").[7] Under

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A layer is a "slice" of the $75,000,000, and the four layers were "stacked" one on top of the other. Each insurer agreed to provide insurance for that layer only. And, as soon as a loss "wiped out" that layer and it became "exhausted," the next layer kicked in. Here, PinnOak's 2003-2004 layers were: (1) First $7,500,000 insured excess deductibles; (2) $12,500,000 insured excess of the first $7,500,000 insured; (3) $30,000,000 insured excess of the first $20,000,000 insured; and (4) $25,000,000 insured excess of the first $50,000,000 insured (i.e. $7,500,000 + $12,500,000 + $30,000,000 + $25,000,000 = a total of $75,000,000).

[5] See Plaintiffs' First Amended Complaint, at ¶7.

[6] Id.

[7] See Affidavit of Simon White in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, ¶10 and Ex. 3.

this Settlement Agreement, the Lloyd's Syndicates subscribing to Policy Nos. AN000337 and AN000338 (two of which are Plaintiffs in this action—the Heritage Syndicate #1200 and the Talbot Syndicate #1183) resolved PinnOak's lawsuit by paying their respective share of a $56,000,000 settlement.

The Settlement Agreement provided that PinnOak and Insurers released all claims relating to the August 31, 2003 loss **and** asserted in PinnOak's lawsuit. Specifically, Petitioners quote the relevant parts of the Settlement Agreement's Recital section:

> 3. WHEREAS, PinnOak procured certain insurance policies providing business interruption and other coverage, which policies were layered to insure PinnOak for $75,000,000.
>
> 4. WHEREAS, Broker Policy No. AN0300337 insured PinnOak for fifty five percent of $30,000,000 excess of $20,000,000, and Broker Policy No. AN0300338 insured PinnOak for one-hundred percent of $25,000,000 in excess of $50,000,000, pursuant to the terms and conditions stated in the policies and endorsements thereto.
>
> * * *
>
> 6. WHEREAS, a dispute exists over PinnOak's claim for business interruption and other losses under the aforementioned policies of insurance, as well as PinnOak's claims of bad faith by Insurers and VeriClaim relating to and/or arising out of one or more methane ignitions/explosions at the Pinnacle Mine beginning on August 31, 2003 (hereinafter referred to as the "Loss") and the subsequent claim handling and investigation.
>
> * * *
>
> 9. WHEREAS, PinnOak desires to fully and globally release Insurers and VeriClaim from all of PinnOak's claims relating to the **Loss and** asserted in the lawsuit styled *PinnOak Resources, LLC et al. v. Certain Underwriters at Lloyd's, London, et al.*, Case No. 5:04-CV-0192[8] (the "Coverage Action"), and Insurers and VeriClaim agree to the same,

[8] 5:04-CV-0192 was the docket number for the District Court for the Southern District of West Virginia. PinnOak's action had a federal court docket number because the defendants had removed the action to federal court. The action was later remanded and the docket number in the Circuit Court of Wyoming County was 04-C-30.

including a release for any and all causes of action arising out of the subsequent claim handling and investigation.

10. WHEREAS, Insurers and VeriClaim desire to release PinnOak from all of Insurers' claims relating to the **Loss and** asserted in the Coverage Action, and PinnOak agrees to the same.[9] [emphasis added]

Review of the above Recitals shows that the Settlement Agreement applied to PinnOak's claims relating to the August 31, 2003 loss **and** asserted in PinnOak's coverage action filed in Wyoming Co.

The Settlement Agreement's subsequent clauses utilize the Recital's ¶6 definition of "Loss". These subsequent clauses include the Settlement Agreement's "release" clause, "indemnification" clause, "anti-reimbursement/contribution" clause, and "entire agreement" or "merger" clause, which Heritage and Talbot quote in full below:

4. In consideration of the agreements set forth herein, each of the Insurers and VeriClaim and their respective investors, shareholders, general and limited partners, parents, subsidiaries, successors and assigns (the "Insurer Releasors") hereby releases and discharges PinnOak as well as PinnOak's officers, directors, stockholders, parents, subsidiaries, attorneys, successors and assigns, from all actions, or causes of action whether in contract or tort (each including but not limited to statutory or common law claims, claims for attorneys fees, unfair or improper practices or methods of competition, consumer protection acts or bad faith), suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialities [sic], covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which the Insurer Releasors ever had, now have or hereafter can, shall or may have, for, upon or by reason of the **Loss**. Necessarily, the release and discharge contained in this paragraph does not apply to any loss other than the **Loss**. [emphasis added]

* * *

7. Each of the Insurers, and VeriClaim, shall protect, indemnify, and save PinnOak, its officers, directors, subsidiaries, affiliates, successors, assigns, stockholders, directors, officers, employees and agents, by policy number only, harmless from and against any and all

[9] See Ex. 3 to White Aff., Settlement Agreement, ¶¶1-10.

claims, demands, liabilities and causes of actions of every kind and character brought by any party purporting to or attempting to assert any claim by, through, or on behalf of any of the Insurers or VeriClaim, growing out of, or resulting directly or indirectly from, the **Loss**; *provided, however*, that Insurers and VeriClaim shall have no such obligations with respect to any claim asserted by another insurer or a reinsurer relating to the **Loss**. [emphasis added]

* * *

8. Insurers shall not, under any legal theory, seek reimbursement of, or contribution toward, the advances and sum to be paid to PinnOak described in Paragraph 1 of "Agreements" above, from any other insurer or from any other present or former party to the Coverage Action, except with respect to the rights that Insurers may have with respect to reinsurers pursuant to reinsurance agreements, contracts or relationships.

* * *

10. This agreement constitutes the entire agreement between PinnOak, Insurers, and VeriClaim regarding **the subject matter hereof**, and supersedes all other prior discussions, agreements and understandings, both written and oral, with respect thereto. This agreement shall not be amended, modified or assigned except by express written agreement of PinnOak, Insurers, and VeriClaim.[10] [emphasis added]

The above clauses only relate to a defined term—**Loss**. And, the defined term **Loss** does **not** refer to Heritage and Talbot's claim for premium under Policy B0711.

Pursuant to the Settlement Agreement, Heritage and Talbot paid their proportionate share of the settlement amount, as did the other nine Syndicates who did not subscribe to Policy B0711. Thus, Heritage and Talbot did **not** receive any discount off the amount of the settlement for allegedly releasing their right to an additional premium of $6,250,000.[11]

B. PinnOak's 2004-2009 Property Insurance (Policy B0711)

1. Initial Negotiations

[10] See White Aff., Ex. 3., Settlement Agreement, ¶¶ 4, 7, 8 & 10.
[11] See White Aff. At ¶13.

In the Spring/early Summer 2004, the mine was just returning to production after a nine-month interruption attributable to the ignitions that began on August 31, 2003. During this time, PinnOak sought property insurance in the Lloyd's marketplace for a term beginning June 30, 2004[12] (i.e., a new policy to replace Policy No. AN0300338 for $25,000,000 excess $50,000,000 that was expiring on June 30, 2004).

At first, PinnOak offered to pay various Lloyd's Syndicates, on the layer of $25,000,000 excess $50,000,000, some $5,000,000 in premium for **one** year of coverage (i.e. June 30, 2004 to June 30, 2005).[13] And one Lloyd's Syndicate (Heritage Syndicate 1200) accepted PinnOak's offer.[14] PinnOak and Heritage then memorialized the insurance contract's terms in a "Placing Slip."[15] And, under the contract, PinnOak would pay $5,000,000 in premium for one year of coverage.[16] This one-year policy did **not** contain the words "payback" or "payback premium," because PinnOak owed the premium **up-front.**[17]

2. PinnOak Negotiates Policy B0711

This Court will appreciate that, at the time PinnOak was attempting to purchase the replacement insurance in the Spring/early Summer of 2004, PinnOak was short of cash due

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[12] See White Aff., ¶8.
[13] See White Aff., ¶8. See also Affidavit of Leslie John Rock in Support of Plaintiffs' Motion to Alter or Amend, ¶¶ 8&9.
[14] See White Aff, at ¶8.
[15] See White Aff., at ¶8; see also Rock Aff. at 8&9. An insurance broker prepares the "Placing Slip." The Placing Slip contains the material terms of an offer to purchase insurance. A Lloyd's Syndicate indicates an acceptance to the offered terms by affixing the Syndicate's stamp to the Placing Slip. See, e.g., Houston Cas. Co. v. Certain Underwriters at Lloyd's, London, 51 F. Supp. 2d 789, 792 (S.D. Tex. 1999). See also, for example, Exhibit 1 to Les Rock's Affidavit, which is a Placing Slip. Heritage and Talbot's stamps are affixed to the page indicated by LLOYDS 26924.
[16] Id.
[17] See Rock Aff., Ex. B.

to the Pinnacle Mine's August 2003 closure.[18] And, after negotiating the one-year policy for $5,000,000 in premium (due at the Policy's inception), **PinnOak promptly asked Heritage to defer the premium until PinnOak had a better cash flow.**[19] Specifically, **PinnOak** changed the "Placing Slip" and offered to purchase coverage for a five-year period from June 30, 2004 to June 30, **2009** along the following different premium terms:

- PinnOak would pay $375,000 annually from 2004 to 2009.
- PinnOak would pay an additional $6,250,000 of premium in five annual installments of $1,250,000.
    - PinnOak's first additional premium payment of $1,250,000 became payable "**on settlement of the August 2003 loss.**"[20]
- In addition, PinnOak could elect not to renew the 2004-2009 Policy at the end of each Policy year (i.e. at June 30 of each year). But if PinnOak did not renew the insurance, the balance of the $6,250,000 became "payable in full" **after** settlement of the August 31, 2003 loss.[21]

The above premium terms show that, under PinnOak's new offer, PinnOak owed most of the premium only **after** they settled the August 31, 2003 loss.

This time, Heritage (Syndicate 1200) **and** Talbot (Syndicate 1183) agreed to PinnOak's offer. PinnOak, Heritage and Talbot memorialized the terms in a new Placing Slip, which became Policy "B0771."[22] This valid and binding contract now, for the first

[18] Id. at ¶¶ 6,8,&10.
[19] Id. at ¶ 10. See also White Aff., at ¶9.
[20] See Slip attached to the First Amended Complaint, at p.2.
[21] See Rock Aff. at ¶¶ 3-5. See also White Aff. at ¶3-6.
[22] Id. at ¶ 10.

time, used the words "payback" and "payback premium" because PinnOak was required, in the future, to pay back a premium that was formerly due at inception, but was now deferred.

Specifically, Policy B0711's new terms stated as follows:

> PERIOD: From: 30th June 2004 to 30th June 2009, or date to be agreed Slip Leader, beginning and ending 12:01 AM at the location of the property insured as per the Underlying Policy Wording.
>
> CONDITIONS: ...
> In the event of non-renewal the full **pay-back** becomes payable in full.
>
> PREMIUM: USD 375,000 (100%) Annual
>
> Plus USD $1,250,000 (100%) Payback Annual, payable on settlement of the August 2003 loss[23]

The deferred premium arrangement allowed PinnOak to defer a $6,250,000 premium over some five years ($1,250,000 x 5 = $6,250,000). This deferred premium stands in stark contrast to the $5,000,000 PinnOak owed immediately under the first contract (for only 1 year of coverage). This new contract (B0711) incorporated both the time value of money as well as four additional years of coverage, which provided both PinnOak and Petitioners with mutual benefits.

PinnOak declined to renew the policy number B0711 after the first year (2004-2005).[24] And, after the August 31, 2003 loss settled (on May 30, 2006), PinnOak refused to pay the deferred premium.[25]

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[23] See White Aff., at Ex.1 at page stamped LLOYDS 26920. See also Rock Aff., Ex. 1 at page stamped LLOYDS 26920.
[24] See First Amended Complaint, at ¶10.
[25] See White Aff., ¶ 14.

In refusing to pay the deferred premium, PinnOak noted that the Policy ended on June 30, 2005 and was no longer in effect when the loss settled on May 30, 2006. PinnOak then claimed that Heritage and Talbot had no right to enforce the premium terms of the expired policy.[26]

PinnOak's refusal to pay the agreed premium caused Heritage and Talbot to file this breach of contract action in October 2006. After Heritage and Talbot sued, PinnOak finally claimed that it did not owe the premium because Heritage and Talbot had allegedly released their right to the deferred premium in the Settlement Agreement.[27]

The following timeline summarizes the above events:

[26] See White Aff., ¶15 and Ex. 4.
[27] See White Aff., at ¶¶14-15 and Ex. 4.

Date	Event
June 30, 2003 – June 30, 2004	Term of PinnOak's first property policies (Nos. AN0300335/6/7/8) provided by Lloyd's.
August 31, 2003	PinnOak's date of loss.
February 6, 2004	PinnOak filed a lawsuit arising out of August 31, 2003 loss.
Spring/early Summer 2004	While the mine was just returning to production after a nine-month interruption, PinnOak sought new insurance from Lloyd's. PinnOak offered to pay a $5,000,000 premium for a one-year policy, and Petitioner Heritage accepted that offer. **The binding contract did not refer to any "payback."**
June 29, 2004	PinnOak offered new premium terms. And, Heritage and Talbot agreed to cover PinnOak per PinnOak's new offer as referenced in Policy No. B0771. The Policy's term was from 2004-2009. The Policy states that PinnOak owed $375,000 annually. And, PinnOak owed additional premium of $1.25 million annually, for a total of $6.25 million in additional premium during the life of the five-year policy. If PinnOak elected not to renew the Policy, then PinnOak owed the additional premium of $6.25 million in full. But the additional premium only became due 60-days **after** the August 31, 2003 loss settled. Thus, the vast majority of the premium was deferred. **This new contract now, for the first time, used the words "payback" and "payback premium."**
June 30, 2005	The first year of Policy No. B0771 ended. PinnOak did not renew the Policy.
May 30, 2006	PinnOak's August 31, 2003 loss settled.
July 29, 2006	Sixty days expire. PinnOak failed to pay the premium due under Policy No. B0771.
October 12, 2006	Heritage and Talbot file suit to collect the premium owed.

Procedural History

On December 27, 2006, PinnOak moved to dismiss Heritage and Talbot's First Amended Complaint pursuant to Rule 12(b)(6). The Circuit Court held a hearing on PinnOak's Motion on February 24, 2007, during which the Circuit Court converted

PinnOak's Rule 12(b)(6) Motion into a Rule 56(e) Motion for Summary Judgment. The Plaintiffs then submitted the affidavit of Simon White, Group Head of Claims for Heritage. White swore that he was personally familiar with Policy No. B0711, that its premium would **not** be paid as a "reimbursement" of the August 31, 2003 loss, and that Heritage and Talbot did **not** give up their right to premium under Policy B0711 when Lloyd's settled the coverage action concerning Policy Nos. AN000337 and AN000338. This affidavit was more than sufficient to withstand summary judgment and permit discovery, since it was the only evidence in the record from a party in the litigation concerning the meaning of the term "payback" and also the terms of the settlement agreement.

On April 11, 2007, the Court rejected White's Affidavit and granted PinnOak summary judgment based on two findings:

- The term "payback" in Policy B0711 referred to PinnOak's obligation to payback **settlement monies** PinnOak would receive for the August 2003 loss. And,
- Heritage and Talbot released all rights to the settlement monies under the terms of the Settlement Agreement.

Accordingly, the Court found that Heritage and Talbot forfeited any right to a "payback" premium under the terms of the Settlement Agreement that accompanied the May 2006 settlement.

Heritage and Talbot filed a Rule 59(e)[28] Motion to Alter or Amend the Court's April 11, 2007 Judgment on April 25, 2007. Accompanying this motion was an affidavit from Lloyd's underwriter, Leslie Rock, that explained the meaning of the word "payback." And,

[28] Incorrectly styled as a Rule 56(e) motion.

the Court held a hearing on Heritage and Talbot's Rule 59(e) Motion on June 15, 2007. The Court then entered a one-page order denying Heritage and Talbot's Motion on June 21, 2007. This order did not address Simon White or Leslie Rock's affidavit in any way. Heritage and Talbot therefore appealed both the Court's April 11, 2007 and June 21, 2007 rulings. And, on April 2, 2008, this Honorable Court granted Heritage and Talbot's Petition for Appeal.

ASSIGNMENTS OF ERROR

1. The Court's April 11, 2007 and June 21, 2007 decisions found, without any discovery, that the **only** explanation for the word "payback" in Policy B0711 was to payback part of the settlement monies that PinnOak received for the August 31, 2003 loss. However, Policy B0711 allowed PinnOak to defer paying the vast majority of a previously agreed premium of $5,000,000. Does the word "payback" refer to "payback" of the $5,000,000 premium that PinnOak deferred as Les Rock explained? Or, does the word "payback" refer to settlement monies as the Circuit Court concluded?

2. The Settlement Agreement applied to all claims arising out of the August 31, 2003 "**Loss**" and "**asserted in**" PinnOak's lawsuit against Lloyd's. The Settlement Agreement defined "Loss" as PinnOak's insurance claims under Policies AN000337 and AN00338 relating to the August 31, 2003 methane ignitions, as well as PinnOak's bad faith claims. In contrast, the action below sought payment of an insurance premium under a totally new contract—Policy B0711. Did the Circuit Court err in concluding that Heritage and Talbot released their right to premium under the new contract--Policy B0711—when they settled PinnOak's claims arising out of the old policies concerning the August 31, 2003 "Loss"?

DISCUSSION OF LAW AND RELIEF PRAYED FOR

I. Standard of Review

The Circuit Court converted PinnOak's 12(b)(6) motion into one for summary judgment. A motion for summary judgment can be granted only when it is clear that there is

no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.[29]

In determining whether to grant a motion for partial summary judgment, the Circuit Court was required to read the record in a light most favorable to the non-moving party (i.e. Heritage and Talbot) and to indulge all inferences in favor of Heritage and Talbot.[30] PinnOak, the moving party, bore the burden of demonstrating that no genuine issues of material fact existed.[31] The Circuit Court's function, at the summary judgment stage, was not to weigh the evidence and determine the truth of the matter, but was to determine whether there is a genuine issue for trial.[32] Summary judgment is only appropriate where the record, taken as a whole, could **not** lead a rational trier of fact to find for the nonmoving party (i.e., Heritage and Talbot).[33]

The Supreme Court of Appeals reviews a Circuit Court's entry of summary judgment *de novo*.[34] This standard of review also applies to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e).[35] Thus, the Supreme Court of Appeals will review both the summary judgment and the denial of Heritage and Talbot's Rule 59(e) motion *de novo*.

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[29] Estate of Robinson v. Randolph County Commission, 209 W.Va. 505, 509; 549 S.E.2d 699, 703 (2001).
[30] See Farley v. Shook, 218 W. Va. 680; 629 S.E.2d 739 (2006); see also Herrod v. First Republic Mortg. Corp., Inc., 218 W. Va. 611, 625 S.E.2d 373 (2005).
[31] See Goodwin v. Bayer Corp., 218 W.Va. 215, 624 S.E.2d 562, 563 (2005).
[32] See Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).
[33] Id.
[34] Mill v. Watkins, 213 W.Va. 430, 434; 582 S.E.2d 877, 881 (2003); See also Rhododendron Furniture & Design v. Marshall, 214 W.Va. 463; 590 S.E.2d 656 (2003).
[35] Mill, 213 W.Va. at 434.

II. The Circuit Court Erred in Finding that the Word "Payback" in Policy B0711 Referred to "Payback" from the Settlement Agreement

The Circuit Court found that the **only** explanation for the term "payback" in the Slip (which represents Policy B0711) was a payback **of sums Heritage and Talbot paid pursuant to the Settlement Agreement.**[36] This ruling is unsubstantiated for the following two reasons:

- Policy B0711 does **not** state that PinnOak must payback settlement monies. The Policy only states that PinnOak must payback a premium. Thus, since the Policy does **not** state that PinnOak must payback settlement monies, the Court should not have drawn such a conclusion, particularly without any discovery.
- The Court's ruling conflicts with the affidavits of Simon White, Head of Claims, and Heritage's underwriter, Leslie Rock, who swore that the word "payback" referred to PinnOak's obligation to payback a premium it deferred.

The above means that a rational trier of fact could believe Messrs. White and Rock and find in favor of Heritage and Talbot. Specifically, PinnOak initially agreed to pay a premium of $5,000,000, and then sought to **defer** that premium until it had a better cash flow. PinnOak's negotiations with the Lloyd's underwriter, Leslie Rock (and the Slip's plain terms), show that the word "payback" referred to PinnOak's obligation to payback a premium that PinnOak chose to defer. Accordingly, the Circuit Court erred when, before any discovery, it made a factual determination that the only reasonable conclusion was that

[36] See April 11, 2007 Opinion, at ¶¶13, 29, 30, & 31.

Policy B0711 required PinnOak to "payback" monies that accompanied the Settlement Agreement.

1. The Slip Shows PinnOak Agreed to "Payback" a Premium – Not the Loss

The Circuit Court's April 11, 2007 opinion states that Policy B0711 used the word "payback" in three areas.[37] But Policy B0711 actually used the term "payback" in the following **four** areas:

1. Conditions,
2. Premium,
3. Brokerage, and
4. Under the Talbot stamp.

The Circuit Court erred in overlooking the fourth area under Talbot's stamp. In that area, Policy B0711 used the phrase "payback premium." Specifically, the last page of Policy B0711 states as follows:

> [Talbot stamp]
> IRO **PAYBACK PREMIUM**
> PLEASE SIGN AS 2003 Y.O.A.[38]
> [emphasis added]

Review of the above shows that Plaintiff Talbot used the term "PAYBACK PREMIUM." In other words, Policy B0711 itself shows that PinnOak agreed to payback a **premium**—not a loss.

Moreover, a review of the Slip's premium terms (see pages 7-8, *supra*) shows that PinnOak does not have to payback **anything** received for the August 31, 2003 loss. The

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[37] Id. at ¶10.
[38] See Rock Aff., Ex. 1, p. LLOYDS 26920.

premium terms show that the August 31, 2003 loss simply triggered payment of the premium PinnOak deferred.[39]

Lastly, there was no reason for the Circuit Court to make a factual finding concerning the meaning of the word "payback," without allowing any discovery. Review of the below two quotes from the Circuit Court's April 11, 2007 opinion shows that the Circuit Court drew its own conclusion—which was improper—as to what the parties intended by the word "payback":

> The anti-reimbursement and contribution provision clearly prevents the Plaintiffs herein from seeking "reimbursement of, or contribution toward" the settlement amount "under any legal theory." The 'slip' that the Plaintiffs themselves have attached as Exhibit 1 to their First Amended Complaint on three separate occasions refers to a "payback" which would become due upon settlement of the August 31, 2003 loss. No other payments had been made or would be made to PinnOak or Pinnacle Mining Co. which the Syndicates could have claimed a "payback" to be made from. [¶29]
>
> The alleged "payback" monies owed under this alleged contract appear to be an alleged attempt by the Plaintiffs to assure recovery of potential settlement monies directly resulting from the August 2003 loss. [¶30]

The above quotes show that the Circuit Court drew its own conclusions as to the meaning of the word "payback." Specifically, the Circuit Court determined that "payback" meant the payback of potential settlement monies directly resulting from the August 2003 loss. But as discussed below, these conclusions run contrary to the Petitioners' sworn testimony.

In addition to inappropriately defining the word "payback," as used in the slip, the Circuit Court violated clear principles of contract interpretation. Specifically, this Court has repeatedly held that any term of significance within a contract must be defined based on the subject matter of the contract and the intent of the document's drafters. See Benson v. AJR, Inc., 215 W.Va. 324, 327, 599 S.E.2d 747, 750 (2004) (quoting Oresta v. Romano Bros.,

[39] See Rock Aff., at ¶¶6, 11-15.

137 W.Va. 633, 644, 73 S.E.2d 622, 628 (1952)("recognizing 'general rule' that 'words in a contract will be given their usual and primary meaning **at the time of the execution of the contract**'") (emphasis added)).

In addition, the Circuit Court's refusal to permit the parties to conduct minimal discovery magnified the mistake in defining a critical term in the Placing Slip. Specifically, the lack of discovery[40] deprived the Circuit Court of the opportunity to understand how words of art are used in the London insurance market. This Court has further held that it is error to refuse to permit such discovery where necessary to properly oppose a motion for summary judgment. See Drake v. Snider, 216 W.Va. 574, 577, 608 S.E.2d 191, 194 (2004)("It has been recognized that '[s]ummary judgment is appropriate only after the opposing party has had adequate time for discovery." Cleckley, Litigation Handbook, § 56(f), at 944 (2002).").

PinnOak argues that Heritage and Talbot's contention concerning the meaning of the term "payback" is "nonsensical" because "PinnOak could hardly 'payback' something it was paying to Heritage and Talbot in the first place. The only thing that PinnOak could 'payback' ... was some portion of the settlement sum."[41] This is, however, nothing more than opposing counsel's interpretation. And, it has no evidentiary basis in the evidence in the record because PinnOak did not submit any. More importantly, the evidence from Heritage and Talbot showed that PinnOak was paying back a premium it deferred. Heritage and Talbot's uncontradicted evidence (the Simon White and Leslie Rock affidavits) were

[40] The only sworn evidence as to the meaning of the words "payback" and "payback premium" contradicted the Circuit Court's interpretation.
[41] See PinnOak's Response to Petition for Appeal, p.11.

sufficient to withstand summary judgment and permit discovery, especially in light of the fact that all inferences shall be made in favor of the non-moving party.

2. The Circuit Court Failed to Address the Deferred Premium Arrangement

The Circuit Court's April 11, 2007 decision failed to mention the contract negotiations that immediately preceded Policy B0711. During the 2004 negotiations, **PinnOak offered to pay $5,000,000 for one year of coverage.**[42] And, Petitioner Heritage agreed to the terms PinnOak proposed. The parties then formalized the agreement and a one-year policy with a premium of $5,000,000 became a binding contract. This one-year policy did **not** contain the word "payback."

PinnOak then promptly requested Heritage to modify this one-year contract and allow PinnOak (who was then struggling with a cash flow problem) to **defer** the $5,000,000 premium to a later time when it presumably would have better cash flow. Thus, PinnOak asked to defer the vast majority of the premium until "after" settlement of the August 2003 loss.[43] Petitioners Heritage, and then Talbot, agreed to these deferred premium terms that PinnOak proposed. This valid and binding contract became Policy B0711 and it now used--for the first time—the words "payback" and "payback premium." These words were terms of art chosen, at the time, to reflect the Lloyd's Underwriters' thought processes (see Affidavit of Leslie Rock at ¶¶11-16). Specifically, they reflect the concept that Lloyd's considered that the $5,000,000 premium had been received (pursuant to the first contract of 2004/2005) but then they essentially gave the premium back to PinnOak via a premium deferral.

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[42] Cover was for $25,000,000 excess $50,000,000.
[43] See Slip attached to First Amended Complaint, at p.2.

The deferred premium arrangement allowed PinnOak to defer $6,250,000 premium over some five years. This deferred premium stands in stark contrast to the $5,000,000 PinnOak immediately owed under the first contract (for only 1 year of coverage). This new contract (B0711) incorporated the time value of money and years of additional coverage, which provided both PinnOak and Petitioners with mutual benefits.[44]

But the Circuit Court's April 11, 2007 ruling allowed PinnOak to walk away from its deferred premium obligation. The Circuit Court's ruling means that PinnOak only paid a premium of $375,000 for the second (2004-2009) policy even though they initially agreed to pay $5,000,000. Thus, PinnOak took the benefits of the initial year of a five-year contract and, in return, only paid for a small fraction (i.e. $375,000/$5,000,000 = 7.5%) of that contract's actual value.

PinnOak was free at the Circuit Court level to dispute all of the above with factual evidence. PinnOak was free to submit an affidavit from a PinnOak employee who took part in policy negotiations. Alternatively, PinnOak could have submitted an affidavit from their insurance brokers. But PinnOak did not do so. As a result, the only sworn testimony before the Circuit Court, at the time it granted summary judgment in favor of PinnOak, was that the term "payback" referred to the deferred premium. In view of the forgoing, the word "payback" should have been given its intended meaning "at the time of the execution of the

[44] PinnOak argues, without any supporting evidence, that no rational person would agree to such a policy and then not renew it after one year. But by not renewing the policy, PinnOak avoided paying $375,000 premium *per year for the next four years*. This makes non-renewal a "rational" decision. PinnOak would then pay $6,250,000 for one year of coverage, which is not far off from $5,000,000 to which it initially agreed. PinnOak's argument is another example of where discovery would allow this Court to make a decision based on a full and complete record. As it stands, PinnOak did not submit any evidence on its behalf. Thus, this Court is forced to take a leap of faith in order to accept PinnOak's arguments.

contract [Policy B0711]."[45] The Circuit Court rejected Heritage and Talbot's evidence and found that there was no genuine issue of material fact as to the meaning of this critical term. The Circuit Court then found that the term should be defined as PinnOak suggested, despite the fact that PinnOak failed to submit any evidence in support of such a definition.

The only affidavit in the record from a person who took part in the policy negotiations was from Leslie Rock, chief underwriter for Heritage. Rock's affidavit explained that the word "payback" in Policy B0711 referred to PinnOak's obligation to payback of the $5,000,000 premium, which PinnOak deferred. The word "payback" did **not** refer to PinnOak's obligation to payback settlement monies received for the August 31, 2003 loss. Thus, this affidavit directly contradicts the Circuit Court's factual determination. We quote Rock's affidavit at length here:

> 11. I have specifically reviewed the 2004/2009 slip and note the use of the word "payback" on four occasions. The first should be placed in context. Specifically, it appears as part of a handwritten note that, with the typed wording, reads as follows:
>
> > In the event of losses hereon the Assured will self-insure on this layer a USD amount equivalent to 50% of the August 2003 loss to this layer not exceeding USD $12,500,000 in all less 5 equal annual installments of USD 1,250,000 the first payment being due after settlement of the August 2003 loss. In the event of non renewal the full payback becomes finalized in full.
>
> The above language was proposed by PinnOak's broker, Mark Hutchinson of Prentis Donegan. The entire clause refers to Insurers and PinnOak

[45] See Benson, supra, p.17.

responsibility for a possible future loss to the 2004/2005 policy and has nothing to do with the loss that occurred in 2003.

12. The second use of the word "payback" appears in the Premium section and reads in context as follows:

> USD 375,000 (100%) Annual
>
> Plus USD 1,250,000 (100%) Payback Annual, payable on settlement of the August 2003 loss

13. The above use of the word "Payback" refers to the paying back of premium that was initially proposed (i.e. the $5,000,000). Again, it was PinnOak that initially proposed a premium of $5,000,000 and it was PinnOak that requested the ability to spread this premium out over time (i.e. over 5 years).

14. The third use of the word "payback" appears in the BROKERAGE calculation. This reference simply means that the broker would not receive an increase in brokerage attributable to the payback premium.

15. Lastly, the fourth use of the word appears under the Talbot stamp and reads as follows:

> IRO Payback Premium please sign as 2003 y.o.a.

The above reference means that the premium was truly a "Payback Premium." The reference was a bookkeeping entry as the Talbot syndicate wished the additional premium to be part of their 2003 year of account. More importantly, the use of the phrase "payback premium" has nothing to

due [sic] with the August 2003 loss. It is a reference to the premium due for the new 2004/2005 policy.

16. Overall, the slips for the 2003/2004, 2004/2005 and 2004/2009 policy years were not drafted by Heritage. Rather, they were drafted by PinnOak's broker, Prentis Donegan. The first slip for the 2004/2005 policy did not use the word payback as PinnOak simply agreed to a premium of $5,000,000. Thereafter, PinnOak's broker requested that the premium be spaced out over time. The new slip for the 2004/2009 policy reflected this request and this new slip then incorporated the word "payback" to refer to the original premium that had been agreed and was now deferred.[46]

The above represents the only sworn testimony that explains the words "payback" and "payback premium."

Petitioners point out that, even if PinnOak had offered sworn testimony that contradicted Leslie rock's affidavit, such would have created a genuine issue of fact that would have required a jury trial. Instead, the Circuit Court completely ignored the only sworn testimony concerning the word "payback" and ruled, without permitting any discovery, that the word "payback" referred to PinnOak's obligation to payback monies from the Settlement Agreement. For this reason alone, the Circuit Court erred and this Court should reverse its decisions and remand this matter to allow adequate discovery prior to considering any motion for summary judgment.

[46] See Rock Aff., ¶¶ 11-15.

III. The Settlement Agreement, on its Face, did not Release PinnOak's Obligation to Pay Premium under Policy B0711

Review of the Settlement Agreement shows that it was a global release of all claims related to the **Loss**—not all claims under the Sun. Tellingly, the term **Loss** was limited to PinnOak's coverage and alleged bad faith claims arising out of the August 31, 2003 methane ignitions—**not** Heritage and Talbot's claim for premium under Policy B0711. Thus, when settling the August 2003, loss the Petitioners did not release claims under Policy B0711.

Additionally, a review of the specific insurance policies cited in the Settlement Agreement shows that the Settlement Agreement does **not** even refer to Policy B0711. The only insurance policies specifically named in the Settlement Agreement were Policy No. AN0300337 and Policy No. AN0300338. Thus, the plain terms of the Settlement Agreement shows that Petitioners did **not** release claims under a different policy—Policy B0711.

Petitioners now discuss the above two points.

1. The Settlement Agreement's Definition of "Loss" does not Include Claims under Policy B0711

The Circuit Court's April 11, 2007 opinion quoted the Settlement Agreement's "Merger," "Anti-reimbursement and Contribution", "General Release," and "Indemnification" clauses. The Court then found as follows:

> The "Agreement," through the merger clause, anti-reimbursement and contribution, and general release provisions, clearly evidences the intent of the parties to settle and walk away from all disputes and outstanding claims related to the August 2003 loss. [See ¶28 of the Court's Opinion.]

In so holding, the Court neither quoted nor, more importantly, addressed the Settlement Agreement's definition of the word "Loss."

Review of the Settlement Agreement's definition of the word "Loss," quoted below, shows that it only applied to PinnOak's insurance and bad faith claims related one or more methane ignitions beginning on August 31, 2003:

> 6. WHEREAS, a dispute exists over PinnOak's **claim for business interruption and other losses** under **the aforementioned policies of insurance**, as well as **PinnOak's claims of bad faith** by Insurers and VeriClaim relating to and/or arising out of one or more methane ignitions/explosions at the Pinnacle Mine beginning on August 31, 2003 (hereinafter referred to as the "**Loss**") and the subsequent claim handling and investigation.[47] [emphasis added]

Review of the above shows that the Settlement Agreement defined "Loss" as **PinnOak's** "claim for business interruption and other losses... as well as PinnOak's claims of bad faith...." Nothing in the Settlement Agreement referred to the Petitioners' right to a premium due under the five-year Policy B0711.

There is no evidence from PinnOak that the parties contemplated Policy B0711 during the settlement negotiations. In fact, there not one affidavit from a PinnOak employee explaining the settlement negotiations. Thus, there is no evidence that the settlement negotiations contemplated, encompassed, or addressed anything other than **PinnOak's** claims arising from one or more methane ignitions beginning on August 31, 2003.

In view of the parties' intentions to resolve the "Coverage Action," the parties defined "Loss" in the Settlement Agreement to mean PinnOak's business interruption and other losses under the referenced policies of insurance, as well as PinnOak's claims of bad faith. The Settlement Agreement's "Merger," "Anti-reimbursement and Contribution," "General Release," and "Indemnification" clauses, then specifically incorporate the parties' definition of "Loss."

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[47] See White Aff., Ex. 3. Settlement Agreement, ¶6.

Therefore, the clauses only apply to the parties' definition of "Loss." And, the definition of "Loss" does **not** mention, refer to, incorporate, or even allude to the payment of premium under Policy B0711. The clauses on which PinnOak relied on only relate to a defined term—**Loss**. And, that term, **Loss**, does **not** include Heritage and Talbot's claim for premium under Policy B0711.

Heritage and Talbot do **not** dispute the validity of the Settlement Agreement's "Merger," "Anti-reimbursement and Contribution," "General Release," and "Indemnification" clauses. But each of those clauses only applies to the agreed definition of "Loss" in the Settlement Agreement. And, the definition of "Loss" shows that it only includes PinnOak's "claim for business interruption and other losses ... as well as PinnOak's claims of bad faith ...." arising out of the August 2003 methane ignition. The foregoing shows that the definition of "Loss"—by its very terms—does **not** include Heritage and Talbot's claims arising out of PinnOak's failure to pay deferred premium under a separate contract of insurance with Heritage and Talbot running from 2004-2009.

2. Settlement Agreement does not Include Policy B0711

This Court should also review the specific policies cited in the Settlement Agreement's definition of "Loss." The agreed definition of "Loss" in the Settlement Agreement states that a dispute existed under the "**aforementioned** policies of insurance." The Settlement Agreement, in Recitals Paragraph 5, states that the "aforementioned policies of insurance" are the policies that were in effect during **2003-2004** (i.e. Policies AN000337 and AN000338). The "aforementioned policies" did **not** include Policy B0711, which was

in effect from 2004-2009.[48] Thus, the Settlement Agreement does **not** refer to Policy B0711, or any claims arising out of Policy B0711.

The parties should be allowed to continue a business relationship, and enforce subsequent contracts resulting from that business relationship, while still settling an existing dispute such as the August 31, 2003 loss. PinnOak did nothing more, when executing the Settlement Agreement, than release claims arising out of the August 31, 2003 loss. It follows then that Heritage and Talbot also have the right to force PinnOak to pay the agreed premium under a separate contract of insurance.

Petitioners Heritage and Talbot request that this Honorable Court reverse the Circuit Court's opinion and find that the Settlement Agreement should be interpreted as follows:

- The Settlement Agreement's "Merger," "Anti-reimbursement and Contribution", "General Release," and "Indemnification" clauses only apply to the Settlement Agreement's definition of "Loss."
- The Settlement Agreement defined "Loss" as PinnOak's "claim [stemming from the August 31, 2003 incident] for business interruption and other losses... as well as PinnOak's claims of bad faith..." under "aforementioned policies of insurance...."
    - The "aforementioned policies of insurance" do **not** include Policy B0711, which ran from 2004-2009.
- The Settlement Agreement's definition of "Loss" does **not** include Heritage and Talbot's claims arising out of PinnOak's failure to pay deferred premium under Policy B0711.

The above interprets the Settlement Agreement according to its plain terms. And, the above interpretation specifically excluded subsequent business arrangements, such as Policy No. B0711.

[48] Subject to whether PinnOak renewed it each year.

In addressing a settlement agreement's scope, this Court has held that "'[a] release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution.'" Woodrum v. Johnson, 210 W.Va. 762, 769, 559 S.E.2d 908, 915 (2001)(quoting Syl. pt. 2, Conley v. Hill, 115 W.Va. 175, 174 S.E. 883 (1934), overruled on other grounds, Thornton v. Charleston Area Med. Center, 158 W.Va. 504, 213 S.E.2d 102 (1975)). Here, the parties specifically defined the matters that were contemplated as part of the Settlement Agreement that resolved the prior litigation. The parties specifically declared that the agreement contemplated the release of claims made as a result of the August 31, 2003 methane ignition under Policies No. AN0300337 and AN0300338. The Settlement Agreement makes no mention of Policy No. B0711 and there is nothing within the language of the Settlement Agreement to support the idea that the agreement intended to resolve claims arising under that policy. Moreover, PinnOak did not submit any sworn affidavits that explained that the Settlement Agreement was supposedly intended to resolve claims under Policy B0711. Furthermore, the Placing Slip for Policy No. B0711 specifically provided that the resolution of PinnOak's claim from the August 31, 2003 methane ignition would act as a trigger for the obligations of the parties under the later 2004/2009 policy. Thus, it was clear error for the Circuit Court to conclude otherwise and this error should now be reversed.

3. The Settlement Agreement Does not Give Heritage and Talbot Any Consideration for Supposedly Releasing its Right to $6,250,000 Premium

If Heritage and Talbot did, in fact, give up their right to receive $6,250,000 in premium, it can be expected that PinnOak would give Heritage and Talbot something in return. In other words, there is no free lunch. The Settlement Agreement, however, gives

Heritage and Talbot ***nothing***. This illustrates why the Settlement Agreement does not apply to Heritage and Talbot's claim for $6,250,000 in premium.

To explain, PinnOak agreed to settle for $56,000,000 with eleven Lloyd's Syndicates[49] (i.e. insurers authorized to conduct business in the Lloyd's marketplace). The eleven Lloyd's Syndicates, including Heritage and Talbot, then executed the Settlement Agreement. Review of the Settlement Agreement's terms shows that each Syndicate was treated the same. They each had to pay their proportionate share of a $56,000,000 loss based on the proportionate share of the insurance they wrote.

But Heritage and Talbot were **not** in the same position as the other nine insurers. Specifically, the moment PinnOak settled, PinnOak owed Heritage and Talbot a deferred premium of $6,250,000 under Policy B0711.

But the Settlement Agreement did not give Heritage and Talbot any consideration for releasing their right to the deferred premium. In other words, the Settlement Agreement treats Heritage and Talbot the same as the other nine insurers even though Heritage and Talbot were in a very different position because they were, according to PinnOak, giving up their right to a deferred premium of $6,250,000.

This illustrates that Heritage and Talbot did **not** release their right to $6,250,000 in the Settlement Agreement. Otherwise, Heritage and Talbot would have received something substantial as consideration. Stated differently, in order for PinnOak to get something (i.e. a release of the deferred premium under Policy B0711), they have to give something in return. But PinnOak gave Heritage and Talbot nothing. This shows that Heritage and Talbot did not release their right to premium, or they would have gotten consideration in return.

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[49] See White Aff., at ¶10.

This evidence was contained in Simon White's affidavit[50] and was therefore with the Court **before** it ruled on Plaintiffs' Rule 12(b)(6) Motion. But the Court chose to ignore this evidence in its April 11, 2007 ruling.

CONCLUSION

This Honorable Court should reverse the Circuit Court's two orders for the following reasons:

- Heritage's underwriter, Les Rock, provided the only sworn testimony that explains the words "payback" and "payback premium." This explanation runs contrary to the Circuit Court's factual conclusion concerning the meaning of those words.

- The parties to the May 2006 Settlement Agreement carefully drafted a release that specifically defined its scope. The parties agreed that it only applied to the "Loss" and that term did **not** extend to the following year's business/insurance relationship for three reasons.

    - First, the term "Loss" only applied to PinnOak's insurance and bad faith claims arising out of the August 31, 2003 methane ignitions (i.e. it did not extend to Policy B0711).

    - Second, the settlement resolved a dispute concerning the "aforementioned policies of insurance." And, the identified policy numbers did **not** reference policy B0711.

    - Third, if Heritage and Talbot did release their right to $6,250,000 in the Settlement Agreement, Heritage and Talbot would have received something substantial as consideration. But PinnOak gave Heritage and Talbot nothing. This shows that Heritage and Talbot did not release their right to the deferred premium,

WHEREFORE, the Plaintiffs below and Appellants herein, Certain Underwriters at Lloyd's, London, subscribing to Policy B0711, pray for the following:

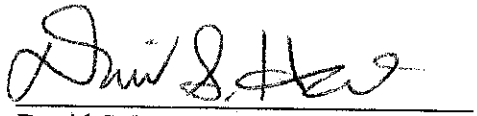
[50] See White Aff. At ¶¶10-13.

- That the April 11, 2007 and June 21, 2007 Orders entered by the Circuit Court of Wyoming County be overturned on the basis that the Settlement Agreement does not extend to premium obligations in Policy B0711; or, in the alternative,
- That this matter be remanded to the Circuit Court of Wyoming County for further proceedings as deemed necessary based upon the relief awarded to the Appellants; and
- For such other and further relief as the Court may deem just.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSRIBING TO POLICY NO. B0711

By Counsel

HAYDEN & HART, PLLC



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CERTIFICATE OF SERVICE

I, David S. Hart, hereby certify that I have served a true and correct copy of the foregoing Petition for Appeal upon the following parties or their counsel, by United States mail, first-class, postage prepaid, on the May 5, 2008, to the following addresses:

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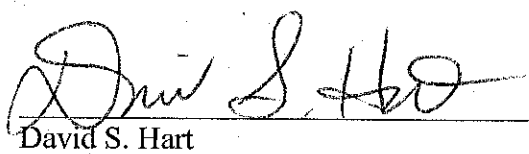

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